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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 346

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 11, 1965, inviting the Solicitor General to submit the views of the United States.

STATEMENT

Respondents, American railroads whose lines connect with the lines of Canadian railroads, agreed with the Canadian railroads upon joint through international rates for shipments of potash between points in New Mexico and Canada. Petitioner, a shipper who paid the rates, filed a complaint against respondents with the Interstate Commerce Commis-

sion, pursuant to Section 13(1) of the Interstate Commerce Act (49 U.S.C. 13(1)), charging that the rates were "unjust and unreasonable" and therefore contrary to Section 1(5) of the Act (49 U.S.C. 1(5)), and asking reparations in the amount of the alleged overcharge.

The proceeding was stayed by the Commission pending its decision in *Consolidated Rendering Co. v. Atchison, T. & S.F. Ry. Co.*, 287 I.C.C. 673, 300 I.C.C. 87. The Commission there held that respondents' rates for potash shipments from New Mexico to the points on the Canadian border at which the shipments cross en route to their Canadian destinations were unjust and unreasonable due to certain rate increases which the Commission had not approved. The Commission determined the maximum just and reasonable rates that respondents could charge for such shipments. The proceeding on petitioner's complaint then resumed, and the Commission found for petitioner. It held the joint through international rates unjust and unreasonable, determined the just and reasonable rates, and awarded petitioner the difference as reparations. 313 I.C.C. 759. Petitioner then brought this suit against respondents in the district court, pursuant to Section 16(2) of the Act, to collect the Commission's award.

The district court gave judgment for petitioner in the amount awarded in the Commission's order. The Court of Appeals for the Seventh Circuit reversed. 342 F. 2d 563. It held that where the American carrier maintains a rate to the border, the shipper's reparations are limited to the difference between that

rate and the just and reasonable rate, which the Commission here had determined in the *Consolidated Rendering* proceeding. The court reasoned that to hold respondents liable for the entire overcharge under the joint through international rate, including the Canadian segment of the shipment, would be contrary to the territorial limitation on the Interstate Commerce Commission's jurisdiction imposed by the Interstate Commerce Act, which, in Section 1(1) (49 U.S.C. 1(1)), provides that the Act applies to common carriers by rail engaged in transportation "from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States." The court distinguished *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654—where American carriers were held liable to the shipper for the entire overcharge under a joint through international rate—on the ground that in those cases the carriers had published no rates applicable to the American portion of the international shipment.

DISCUSSION

As expressly provided in Section 1(1) of the Interstate Commerce Act, the Interstate Commerce Commission has no power to regulate rail transportation outside of the United States. But where a shipper ships goods from a point in the United States to a point in Canada or Mexico, or from a point in Canada or Mexico to a point in the United States, the Commission's jurisdiction clearly extends to the

American segment of the trip, and it is therefore the Commission's duty under Section 1(5) of the Act to prevent the American carrier from charging an unjust and unreasonable rate for its segment. There are, of course, no difficult questions where the American carrier simply offers a rate for the American leg of the international shipment; the Commission's power to regulate and prescribe such a rate is unquestioned. But the Commission's duty is no less when an American carrier joins with a foreign carrier in offering a joint through rate, whereby the shipper pays a single rate for a through shipment and the carriers divide the proceeds.[1] The rate, while "international", obviously includes a charge for the American as well as the foreign segment of the trip. The Interstate Commerce Commission has the power and the duty to protect the shipper from being overcharged for the American segment of the shipment. The problem of this case is how the Commission is to discharge this responsibility.

1. A joint through international rate is an undivided charge for a shipment that moves both within and without the United States. It may be unjust and unreasonable under the standards of the Interstate Commerce Act, but establishing this to be so may not show whether and in what proportion the overcharge is attributable to the American segment of the shipment, which is all the Commission has the power to regulate directly. To be sure, the divisions which the carriers establish show the portion of the charge re-

[1] Each carrier's share is known as a "division".

ceived by the American carrier, but that does not tell what a proper share of a total reasonable charge would be. Accordingly, it has been the consistent view of the Commission and of this Court that, notwithstanding the territorial limitations of its jurisdiction, the Commission may determine whether a joint through international rate is unjust and unreasonable, and, if it finds that it is, award the shipper reparations representing his entire overcharge under the rate. Because the rate is an undivided and unapportioned charge for the entire through movement, including both the American and the foreign segments, the extent of the overcharge applicable to the American segment is unknown. But it is fairer that the American carrier should pay the entire damages than that it should pay none of them. This is the basic teaching of *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654. See, also, *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 620, n. 9.

Assuming the general rule to be that the carrier is fully liable to the shipper in such a situation, the question becomes whether there is any way for the carrier to limit its liability. At issue here are considerations both of convenience to the shipper and fairness to the carrier. It is, of course, open to the carrier simply to decline to participate in joint through international rates. By offering a rate applicable only to the American segment of the international shipment, the American carrier avoids all

liability for the foreign segment. See *Hoffman-Taff, Inc.* v. *St. Louis-S.F. Ry. Co.*, 279 I.C.C. 710, 712. However, as the Commission has recognized, joint through international rates represent a convenience and advantage to the shipper. See *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660, note. Their formation ought therefore not be discouraged. Also, it would be unfair to place the carrier in a position where its liability to pay reparations to shippers depended on circumstances beyond its and the Interstate Commerce Commission's control. Canadian regulatory authorities might forbid Canadian railroads to participate in joint through international rates with American carriers except on terms that would make such rates unjust and unreasonable under American standards, and neither the Commission nor the American carrier could require the Canadian railroad to agree upon a just and reasonable rate. To avoid confronting the American carrier with a Hobson's Choice between foregoing joint through international rates altogether, and assuming full liability to the shipper for damages caused by such rates even where the rate is unjust and unreasonable solely by reason of the actions or policies of the foreign carrier or regulatory body, the American carrier must be permitted to establish that a joint through international rate found to be unjust and unreasonable by the Interstate Commerce Commission is not unjust and unreasonable insofar as the American segment of the shipment is concerned.

2. One possible approach, suggested by certain lan-

guage in the *News Syndicate* and *Lewis-Simas-Jones* decisions, is that the American carrier may escape all liability under a joint through international rate in which it participates by also publishing a just and reasonable rate to the border. We think this approach unsound.

(*a*) Such a rule would rest on the false premise that the only duty imposed on the American carrier by the Interstate Commerce Act with respect to international shipments is to publish a just and reasonable rate applicable to the American portions of such shipments. But a shipment moving under a joint through international rate takes place in part within the United States, and the joint rate is a charge for the American as well as the foreign segment of the total trip. There is no basis in the Act for exonerating the American carrier from all responsibility for the the American portion of the shipment under a joint through international rate merely because it happens also to publish a different rate which appears to be just and reasonable.

(*b*) It is not clear that a just and reasonable rate applicable only to the American portion would always provide the shipper with an adequate alternative. Suppose, for example, that the foreign carrier published no rate applicable to the foreign leg of the through shipment, so that the only way the shipper could ship through to his destination was to pay the joint rate. In such a case, the independent rate published by the American carrier would provide no check upon the freedom of the American carrier to

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overcharge the shipper by fixing an exorbitant joint rate with the foreign carrier.

Or suppose that while the foreign carrier did offer a rate applicable to its segment of the through shipment, the sum of the American and foreign such rates was higher than the joint through international rate, albeit that rate was unreasonably high. Such a situation would be conceivable even if the foreign carrier's independent rate, as well as the American carrier's, was reasonable. A joint through rate is ordinarily lower than a combination of rates, since the "operating costs of a through movement are less than the aggregate costs of the two independent movements covering the same route." *B. & O. S.W. R.R. Co.* v. *Settle,* 260 U.S. 166, 171. Hence, as this Court indicated in *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.,* 269 U.S. 217, 233, a carrier's independent rate is not necessarily a fair measure of what a reasonable rate would be for its segment of a joint through rate.

(*c*) The suggested approach is incompatible with the well settled principle that there can be only one rate applicable to a shipment of the same character between the same points (*e.g., B. & O. S.W. R.R. Co.* v. *Settle,* 260 U.S. 166, 172; *Pittsburgh &c. Ry. Co.* v. *Fink,* 250 U.S. 577, 581) and the underlying policy of the Interstate Commerce Act that shippers similarly situated should be treated the same by the carrier, without discrimination. This policy would be thwarted if on the identical shipment over the identical route between an American and a foreign point two different charges—a combination of two

rates and a single joint through rate—were available. Suppose, for example, that the more powerful shippers decided to forego the joint rate and pay the American carrier its rate to the border, in the hope of negotiating advantageous terms with the foreign carrier on the rate charged by that carrier from the border; and suppose they were successful in negotiating a low rate, with the result that they paid less under the combination of rates than they would have under the joint rate. The result would be discrimination between competing shippers, with the stronger paying a lower rate and the weaker a higher rate (cf. *Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272), made possible by the American carrier's having offered a choice of rates applicable to the American segment of the shipment.

The Court's references in *News-Syndicate* and *Lewis-Simas-Jones* to the American carrier's alternative of publishing a just and reasonable rate applicable to the American segment of the shipment surely were not intended to undermine the settled policy against rate discrimination. The Court may have meant no more than that the American carrier was not compelled to enter into a joint through international rate at all, but could have satisfied its duties under the Act by foregoing the joint rate and offering a rate applicable only to the American portion of the trip. Having chosen to participate in the joint rate—a choice not forced upon it by the Act—the carrier must accept liability if the rate is unjust and unreasonable.

3. Although the carrier cannot, in our view, escape liability for collecting an unjust and unreasonable joint through international rate merely by publishing a just and a reasonable rate to the border, the damages resulting from an unjust and unreasonable joint international rate can, we think, feasibly be apportioned between the American and foreign carrier, and the liability of the former limited to so much of the excessive charge under the rate as is allocable to the American segment of the shipment. The burden of limiting its liability would be on the carrier. It would be required to prove the amount of the just and reasonable charge for the American segment of the shipment under the joint rate. Its damages would then be computed by subtracting that amount from the amount it actually collected under its divisions agreement with the foreign carrier.

An example will illustrate. Suppose the joint through international rate between New York and Toronto on shipments of potash is $20. A shipper complains to the Commission that this is unjustly and unreasonably high; the Commission determines that the just and reasonable rate is $15; and the American carrier proves that with due regard to the relative mileage of the American and Canadian portions of the journey and to other relevant factors the just and reasonable charge for the American leg of the shipment is $5. This charge would then be compared with the actual divisions agreed upon by the carriers for allocating the revenue under the unjust and un-

reasonable $20 rate. If the American carrier's division was $7, the reparations due the shipper would be $2, the amount by which he was unjustly and unreasonably overcharged for the American segment of the shipment.

Under the rule we suggest for limiting the American carrier's liability, just and reasonable joint through international rates would be fostered. The American carrier would not be reluctant to participate in such rates, knowing that it could avoid liability for reparations by accepting a division no greater than would be the just and reasonable charge for its portion of the journey. But it would not be free to overcharge shippers, since, if it received any more than such reasonable charge, it would be open to a suit by the shipper seeking a refund of the excess. To be sure, the shipper might still be overcharged by American standards, depending on the division demanded by the Canadian carrier. But a charge levied by a foreign carrier and applicable solely to the foreign segment of a joint through international rate is not within the intended scope of the Interstate Commerce Act. If the carrier sustains the burden—and we emphasize that the burden of mitigating damages is upon the carrier, as the Court clearly indicated in *News Syndicate* and *Lewis-Simas-Jones*—of demonstrating that the charge fairly applicable to the American segment of a joint through international rate is less than its division of the total rate, the carrier's damages should be reduced accord-

ingly—and eliminated altogether if it can prove that it received no more than the amount to which it would have been entitled had the rate been just and reasonable.[2]

4. The problem discussed in this memorandum is a difficult and important one. Its implications have never, so far as we are aware, been adequately explored. We think Supreme Court consideration of the question is warranted and that this case presents an appropriate occasion for such review. The court below held that where, as here, the American carrier, besides participating in joint through international rates, establishes independent rates to the border, the measure of its damages, if the joint rates are found to be unjust and unreasonable, is the difference between the independent rates that it published and the amounts the Commission determined to be the just and reasonable such rates. As applied here, this method of computing damages is unsound in two respects. First, it has not been shown that the independent rates determined by the Commission to be just and reasonable were in fact applicable to the American segment of the international through shipments. Like the rate in *Lewis-Simas-Jones Co.* v. *Southern Pacific*

[2] The method of mitigating damages we propose is analogous to that employed by the Commission in divisions cases involving domestic joint through rates. See Section 15(6) of the Interstate Commerce Act, 49 U.S.C. 15(6); *New England Divisions Case*, 261 U.S. 184; *Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U.S. 74; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349.

Co., 283 U.S. 654, 663, they may have been applicable only to shipments whose ultimate destinations were points on the border. Obviously, a rate that includes a terminal charge for unloading at the border is not a fair measure of the charge applicable to the American segment of a continuous shipment to a foreign destination.

Second, in computing damages, the court erroneously subtracted the charge applicable to the American leg of the international shipments from the independent rates actually published by the American carriers, rather than from the divisions received by the American carriers under the joint rates. As noted earlier, there can be only one rate applicable to a shipment; if for the same shipment both a joint through rate and a combination of rates are published, the carrier must charge and the shipper must pay the joint rate. *E.g., Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234; *Consolidated Fruit Co.* v. *Atlantic Coast Line R. Co.*, 300 I.C.C. 399, 403. Thus, in the present case, the shipper had no real choice between the American carriers' independent rates and the joint through international rates; he had to pay the latter. Why, then, should the independent rates limit the shipper's damages?

CONCLUSION

Since the substantial questions discussed in this memorandum appear to be inescapably presented by

this case, we urge that the petition for a writ of certiorari be granted.[3]

Respectfully submitted.

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DECEMBER 1965.

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[3] The Interstate Commerce Commission joins the Solicitor General in urging that the petition for a writ of certiorari be granted. On the merits of the question presented by this case, the Commission has asked that its views be stated as follows:

"The Commission's position on the issues presented by the petition for certiorari is that the petition should be granted and the decision below reversed on the narrow grounds that the respondent railroads were fully liable for all unlawfulness in the joint international rates charged the petitioning shipper. Since the joint rates and only the joint rates applied to this traffic, the respondent railroads, consistent with the opinions of this Court in *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, were joint tortfeasors when they charged the shipper unjust and unreasonable rates. Under the rule of these cases, consistently followed by the Commission, the railroads are liable for all damages resulting from their violation of the Interstate Commerce Act in charging unlawful joint rates, including damages to the extent the movements took place within Canada.

"Whether these carriers might have limited their liability by filing some other rates applicable to this traffic, such as local or proportional rates from New Mexico origins to the

border points, is essentially immaterial. The joint rates which the carriers maintained for this traffic took precedence over all combinations of intermediate rates. *Baltimore & O.S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 172; *Kansas City So. Ry.* v. *Albers Comm.*, 223 U.S. 573, 597–98; *Louisville & N. R.R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234; a rule now codified in the tariff regulations of the Commission (49 C.F.R. 141.55).

"The Commission finds no need to limit the liability of U.S. carriers under joint rates under a theory that the filing of such rates must be encouraged. Only a handful of cases arise each year before the Commission involving international rates, and there is no indication from any quarter that the potential liability of U.S. carriers for the entire unlawfulness of joint rates discourages their publishing such rates. Nor is it material that the carriers might in the future choose to file only rates to the border on a higher basis than the present joint rates; for the Commission would retain authority to prescribe the intermediate rates on the basis of the prior division of the joint rates if the same through service was being provided under a combination of rates in lieu of joint rates. The present case falls squarely within the holding of this Court in *News Syndicate*, later reaffirmed in *Lewis-Simas-Jones* under the rationale of joint tortfeasors, that since the railroads filed no intermediate rate legally applicable to the domestic leg of this traffic, but rather 'compelled plaintiff in error to pay the through charges complained of * * * the Commission had jurisdiction to determine the reasonableness of the charges exacted.' (275 U.S. at 187.)"

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